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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE TRUJILLO,

Defendant and Appellant.

D070215

(Super. Ct. No. SCD262041)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Elizabeth M. Kuchar, Deputy Attorneys General, for Plaintiff and Respondent.

In this case, Jesse Trujillo was convicted by a jury of fraudulent appropriation by clerk, agent or employee in excess of \$950 (Pen. Code,¹ § 508). Trujillo was placed on formal probation, subject to various terms and conditions.

Trujillo appeals challenging only a portion of one of the probation conditions. He does not challenge the admissibility or sufficiency of the evidence to support his conviction. At the sentencing hearing, the court imposed the following condition of probation without objection: "Submit person, vehicle, residence, property, personal effects, *computers and recordable media* to search at any time with or without a warrant, and with or without reasonable cause, when required by P.O. or law enforcement officer." (Italics added.) Trujillo challenges only that portion of the search waiver that deals with computers and recordable media.

Although no objection was made in the trial court, Trujillo now contends the highlighted portion of the condition is constitutionally overbroad. Thus, he contends the forfeiture doctrine should not be applied. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) We will treat the issue as properly before us and address the merits. We will find the challenged provision does not constitute an unreasonable intrusion into constitutionally protected activity and is a reasonable condition given the covert nature of this crime, as well as Trujillo's past theft offenses and his history of repeated violations of probation. Rehabilitation of this defendant requires that the probation officer have the tools necessary to monitor him while on probation.

¹ All further statutory references are to the Penal Code unless otherwise specified.

STATEMENT OF FACTS

Since Trujillo does not challenge the admissibility or the sufficiency of the evidence to support his conviction, we will adopt the brief summary of the facts from the respondent's brief as an accurate statement.

Appellant began working at SeaWorld as a games technician on December 23, 2014. As a technician in the games and arcade facility, appellant was responsible for maintaining and servicing the game changing machines, i.e., by filling them with tokens and fixing any malfunctions.

On appellant's first day of work, management noticed that the game changing machines were short a total of \$320. One of SeaWorld's loss prevention investigators, Pauline Lozano, began investigating the situation. After determining that machine malfunction was not the cause of the money shortage, Lozano began looking into the employees. The investigative team monitored the pattern of shortages by reviewing the employees' timecards and installing surveillance cameras. Lozano discovered that the shortages began on December 23, 2014, which was appellant's first day of work, and stopped on May 4, 2015, appellant's last shift before being terminated. During that period of time, the shortages coincided with appellant's shifts and amounted to thousands of dollars.

On May 8, 2015, Lozano met with appellant and confronted him about the money shortages. Appellant became defensive and denied taking any money from the game changing machines. SeaWorld security officers detained appellant and called the police. While waiting for the police to arrive, appellant made some incriminating statements,

admitting that he took a few hundred dollars, to Lozano and one of the security officers. He also told Lozano, "I know I messed up. My family is so mad at me. I shouldn't have done this."

Appellant testified on his own behalf. He denied making any incriminating statements to Lozano and the security officer. Appellant also denied taking money from the SeaWorld game changing machines.

DISCUSSION

It is important here to repeat that Trujillo does not challenge the general "Fourth waiver" requiring him to submit to searches of his home, person, vehicle, property and effects. Given the covert nature of his current crime and his prior thefts, he could not effectively make such a challenge. Rather, he challenges the search condition only as it relates to computers and recordable media.

Trujillo's challenge here relies principally on *People v. Appleton* (2016) 245 Cal.App.4th 717, 723 (*Appleton*.) That case based its rejection of a similar search condition on the premise that *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473, 2493] (*Riley*) which held that police could not ordinarily search a smartphone incident to arrest, and that absent other exigent circumstances a warrant is required to make such search. The court in *Riley* based its decision in large part on the extent of personal information now contained in such electronic devices.

We recently disagreed with *Appleton*, *supra*, 245 Cal.App.4th 717, in *People v. Nachbar* (2016) 3 Cal.App.5th 1122 (*Nachbar*). In that case, we upheld imposition of the identical search condition as used in this case. We are aware that our Supreme Court has

granted review in *Nachbar*² pending resolution of *In re Ricardo P.* (2015) 241 Cal.App.4th 676 (review granted Feb. 17, 2016, S230923). Pending further direction from our Supreme Court, we continue to adhere to the views we expressed in *Nachbar*, as we will discuss below.

A grant of probation is an act of clemency in lieu of punishment. (*People v. Moran* (2016) 1 Cal.5th 398, 402.) Probation is a privilege, and not a right. Thus, trial courts have considerable discretion in formulating conditions of probation, which may assist in rehabilitation and also protect the public. (*Id.* at pp. 402-403.)

In *People v. Lent* (1975) 15 Cal.3d 481, 486, the court held a condition of probation will not be held invalid unless: " 'it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' " (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) "This test is conjunctive--all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Ibid.*)

Where a condition of probation restricts the exercise of constitutional rights we examine the condition to determine if the restriction is rationally related to furthering the goals of probation and whether the restriction is not greater than necessary to achieve the legitimate goals. (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346; *In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

² Review was granted in *Nachbar*, *supra*, 3 Cal.App.5th 1122 on December 14, 2016 (S238210).

Appleton, supra, 245 Cal.App.4th at pages 728 through 729, struck a probation condition allowing probation access to recordable media and computers based on the fact personal information may be on such devices thus making the intrusion too broad. As we have noted the court in *Appleton* relied heavily on the discussion in *Riley, supra*, 134 S.Ct. 2473, about the privacy interests people have in their smart phones. The level of such privacy interests required the use of a search warrant to access those devices.

The court in *Riley, supra*, 134 S.Ct. 2473 did not hold that electronic devices are immune from search, but only that they cannot be searched incident to lawful arrest as an ordinary exception to the warrant requirement. We are not concerned here with such exception to the warrant clause. Here we deal with the application of probation conditions which may lawfully be used to restrict the exercise of constitutional rights of persons convicted of crime and who must be supervised for the rehabilitation and prevention of crime. (*United States v. Knights* (2001) 534 U.S. 112, 119.)

Although the crime in this case was not committed using an electronic device, it was a covert crime, committed repeatedly over a period of several months. It appears this was the second time that Trujillo had been involved in an embezzlement type offense. It also appears from the record that Trujillo is almost impossible to supervise on probation. He has violated past grants of probation on numerous occasions. He has failed to appear and failed to pay fines as a regular habit. Trujillo has accumulated a significant number of arrests for driving on a suspended license largely because he will not address his legal responsibilities. Thus, Trujillo cannot be relied on to properly report his activities, follow

the probation officer's directions, or provide any assurance that he will not continue his covert theft offenses.

We have some difficulty with Trujillo's specific challenge in light of the record. As we have noted, there was no objection to the probation conditions raised in the trial court. Thus, we do not know why Trujillo now objects to the search of electronic devices, but does not object to the search of his person, home, vehicles, and effects. We assume Trujillo concedes his crime and criminal history justify a full Fourth Amendment waiver, but for some reason he now objects to searching electronic devices. If there is a valid need to potentially intrude into the home, or to search his person, we do not understand why that need would not potentially include examining electronic devices where information regarding his activities might well be stored. Certainly, all of the mentioned categories in the search condition are protected under the Fourth Amendment. Government intrusion into any of the identified areas requires a search warrant unless a valid exception exists. Nothing in *Riley, supra*, 134 S.Ct. 2473 indicates the court viewed the privacy expectations of electronic devices as being greater than those of the home or the materials that may be found in the home. The privacy intrusion caused by a search waiver as a condition of probation is justified where the probation officer has a compelling need to monitor the activities of the probationer, particularly as here where there is a need to prevent the person from reoffending.

We believe the privacy concerns expressed in *Riley, supra*, 134 S.Ct. 2473 are inapposite to this case where there is a legitimate basis for a waiver of Fourth Amendment rights.

We find the challenged portion of the search condition in the probation order is reasonable, given the need to supervise this specific defendant on probation. The condition is not overbroad.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.